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THE RIGHT OF SMALL AND MEDIUM-SIZED ENTERPRISES TO POSITIVE DISCRIMINATION IN FREE MARKET COMPETITION

Branko Korže¹

Abstract

The author justifies the right of business entities to free economic initiative on the basis of the human right (hereinafter ‘HR’ or ‘HRs’) to liberty, and the right to positive discrimination of small and medium-sized enterprises (hereinafter ‘SMEs’) on the HR to equality, which is in the legal sense implemented by the HR to equal protection. Such positive discrimination ensures the equal protection of SMEs in the conditions of a free market (hereinafter ‘FM’) competition. Taking HRs as his starting points, the author discusses legal policy reasons that impose the duty to enact special measures in favour of SMEs on the legislature, and evaluates the legal sources in the Republic of Slovenia that regulate such measures. By means of the results obtained from a survey conducted with SMEs, the author examines the effects of measures to ensure the equal market position of SMEs, which in the conditions of economic globalisation enables a fair market game between SMEs and large enterprises, to ensure SMEs their existence and further development.

Keywords

Free Market Competition, Human Right to Equality, Positive Discrimination, Small and Medium-Sized Enterprises, Social Market State

I. Introduction

Free market competition among business entities² is a foundation of the system of a modern social market state (hereafter ‘SMS’). The system is based on the ‘law of supply and demand’ among market competitors, whose economic and social effective operation is the state’s responsibility. The right to free economic initiative deduced from the HR to freedom is enjoyed either individually or, more often, through people’s association of business entities being the personal substratum of companies. The state as the guardian of HRs, in accordance with international conventions, is obliged to ensure conditions for the exercise

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² The concept of ‘business entity’ is in this article used as a synonym for market participants offering goods and services.

of free economic initiative (as a HR on economic freedom) such that this right is enjoyed by all the subjects irrespective of any personal circumstances. However, a consistent exercise of the HR to equality might bring certain legal subjects into a discriminatory position, thereby negating their HR to equality. As a result, the SMS must protect the subjects in such positions by appropriate measures and, should it be necessary, discriminate against them positively. Every business entity is entitled, legally and legitimately, to develop and strengthen their market position, which generally improves their economic power and, with respect to SMEs,³ leads to more favourable business conditions. Due to the advantages of large enterprises, SMEs face problems to compete with them on the market, which can lead to their business problems and the fact of being pushed out of the market by large enterprises. In order to mitigate such negative consequences and ensure their existence on the market in conformity with the HR to equality, as well as restore possibilities for their development, the state (legislature) must establish whether smallness as the personal circumstance of a business entity justifies special measures of positive discrimination taken in their favour, without FM competition being adversely affected. Numerous scientific and professional studies discuss from different points of view the significance of SMEs for economic development, and encourage states' public policies to support SMEs in entering the market, however, they do not base them on human rights issues.

This article focuses on the market position of SMEs in relation to large enterprises, provides a theoretical grounding for the right of SMEs to positive discrimination, and lists proposals for the legislature to ensure these subjects' existence and further development in the conditions of economic globalisation. The aim of the article is to justify the state's task to positively discriminate by special measures in favour of SMEs on the basis of smallness as their personal circumstance. It bases the need for the special measures of positive discrimination to be enacted on the rule that persons in essentially similar positions are to be treated equally, whereas those in essentially non-similar positions unequally; and the justification of the measures on the theory of Rawls' procedural equity, which is based on the supposed equal starting points.

The article is composed of a theoretical and empirical part. In the theoretical part, by using the descriptive method, it discusses the literature from the area of HRs on the basis of which it deductively infers the right of legal subjects to free economic initiative and the right to equality, as well as the right to positive discrimination. Furthermore, by means of the deductive method, it discusses the particularities of SMEs which prevent them from having an equal market position in comparison to large enterprises, and calls on the legislature to take positive discrimination measures. In the second part, based on the established circumstances requiring the adoption of special measures, it examines their regulation in the legal system of the Republic of Slovenia (hereinafter 'RS') and, on the basis of the survey results, inquires whether SMEs are aware of such measures' effects and how such are reflected in their practical activities. Finally, the article concludes with proposals for appropriate changes and supplements in the legal order of the RS.

³ In this article I use for micro, small, and medium-sized enterprises as defined by the 2009 (RS) Companies Act the established term of 'SME', and for those exceeding that Act's criteria the term of 'large enterprise'.

II. Human rights and competition protection

Defining the Importance of Human Rights

Human rights are a fundamental value (individuals' integrity) that a democratic state must ensure to every citizen, and under certain conditions also to other subjects on its and even on foreign territory.⁴ The content of individual HRs is determined by the historical, economic, cultural, social, developmental, and political circumstances of narrower (state) communities, due to which their protection at the international legal is exercised only partially, while entirely only at the national level of individual states.⁵

In accordance with democratic principles and the principles of the 1948 Universal Declaration of Human Rights (hereafter 'UDHR'),⁶ HRs as inalienable rights are exercised directly and are the 'criterion of lawfulness'.⁷ HRs may be restricted only if this is necessary due to the exercise of other HRs, the exercise of the equal HRs of other subjects, or the protection of public, broader social interests. In the process of their gradual legal regulation, human rights have been classified into three categories, i.e. civil and political rights; social, economic, and cultural rights, and collective HRs.⁸

The protection of HRs consists of prevention from interference with HRs by the state and third persons,⁹ as well as protection in mutual relations between the bearers of these rights.¹⁰ HRs protection is to be ensured to individuals and their associations by states and their institutions.

The original bearer of HRs is a human being as a natural person and his values, as well as associations which natural persons as the bearers of such rights join. Following the mentioned fact, business entities are both objects and subjects of human rights protection,¹¹ which also follows from the case law of the European Court of Human Rights.¹² Thus, it is important to also ensure the respect, implementation, and protection of the HRs of associations.

In the framework of the United Nations, basic acts in the area of HRs protection include the UDHR, the International Covenant on Civil and Political Rights (hereinafter 'ICCPR'),¹³ and the International Covenant on Economic, Social and Cultural Rights (hereinafter 'ICESCR').¹⁴ In addition to those, numerous other general acts and legally non-binding sources play a significant role in the interpretation of legal norms, their implementation in ensuring the protection and respect for HRs, and in the procedures of which the aim is to remedy the consequences of HRs violation ("protection, respect, and remedy"). The

⁴ Korže (2014).

⁵ Korže (2010).

⁶ GA Res 217A (III), UN Doc A/810.

⁷ Pavčnik (1997).

⁸ Lampe (2010).

⁹ McBeth (2010, 14).

¹⁰ See more in Tratar (2008).

¹¹ Korže (2014).

¹² Andreangeli (2008).

¹³ 999 UNTS 171.

¹⁴ 993 UNTS 3.

mentioned acts are supplemented and upgraded by regional acts, and acts of national states members of the conventions. Among the regional acts in Europe, the ECHR, the European Social Charter,¹⁵ and numerous other documents have special significance to carry out the Council of Europe's responsibilities.

The Defining of the Right to Equality, Equal Protection, and the Right to Positive Discrimination

The Development of the Concept of Equality in Economic and Legal Theory

The right to equality is, according to Šturm,¹⁶ the “right of an individual to equality ensured both in the legislature’s regulation and the application of law (equality in the law and equality before the law). Together with the principle of a state governed by the rule of law and the principle of a social state, it implements the principle of justice”. Pursuant to Mahnič (2002), equality among people stems from the social evaluation of people as individuals, while legal equality is the equality among people in relation to legal norms, which are to be implemented on the basis of a political will. Flander (2004) claims that equality as a social category refers to the “equal value of a human being as an individual and member of human society as a whole”, from which what follows is “equal dignity that in principle requires from social organization an equal (legal) treatment of individuals”. Irrespective of the mentioned definitions, the concept of ‘equality’ is here used as ‘equality before the law’, whereas ‘equity’ as a practical implementation of the right to equality following the principles of fairness.

By the concept of equality, we understand a matching between different objects, subjects, processes, or circumstances in essential, however not all, characteristics. The characteristics are compared by quantity and quality; thus the principle of equality is crucially connected with the principle of justice as the essence of law. Theories that discuss the relationship between equality and justice stem from different starting points and substantiate the existence of several types of justice. Schmid (2008) divides them into three basic groups: the theories of moral justice (e.g., the view of justice according to the Church’s teachings in Aristotle, Kant, Smith, and Marx), the theories of utilitarian justice (e.g., the views of Machiavelli and utilitarian theorists), and the anti-utilitarian theories of justice (Rawls’ theory of fairness). Other authors deal with many different approaches to form a theory of justice, such as Landy and Conte (2010), that in general distinguish among distributive, procedural, interaction, and informational justice. In recent times many authors have referred to a theory of social justice¹⁷ which is firmly related to distribution theory. Beyazit (2010) argues that society has to provide the distribution of primary goods under distributive justice. The theories mostly consider the concept of justice in the sense of the distribution of goods (utilitarian, communitarian, and libertarian theories), however, in addition to justice in the distribution of income, Rawls’ theory also encompasses the

¹⁵ ETS No. 136.

¹⁶ Šturm et al. (2002).

¹⁷ Martens (2017).

fairness of a social system.¹⁸ His procedural theory of justice stems from the assumption that all legal subjects must have an equal “starting position” (e.g. equal with respect to freedom).¹⁹ His approach to dealing with justice is directly connected to the principle of equality, thus I posit that his theory is appropriate to justify the legislature’s duty to enact mechanisms of positive discrimination due to SMEs’ worse starting market position in comparison to large and economically more powerful economic subjects.

Theoretical Definition of the Concept of Equity and Discrimination

The right to equal protection needs to be separated from the right to equality, which in its practical exercise encompasses entitlements of legal subjects derived from the right to equality. Mahnič (2002) defines the right to equal protection as a “legal formal derivation of the idea of equality of all people”, or the “equality that is manifested and exercised at the legal level, which means that it defines equality among people in relation to law and legal norms”. Lampe (2010) defines the right to equal protection as a “fundamental HR which requires equal treatment irrespective of any personal circumstance”. According to Krajnc (2016), equal protection means that “all individuals have equal rights and duties that must be respected by others, as well as ourselves”.

Prohibition against discrimination follows from the right to equal protection. The prohibition against discrimination is a duty which requires from the legislature²⁰ and other addressees to refrain from treating legal subjects unequally compared to others, since everyone is entitled to equal fundamental HRs. Following Cerar (2005), discrimination “is value-focused negative differentiation among people which causes unjustified, predominantly, or generally unwanted inequality among them”. Flander (2004) considers discrimination to be “activities or processes which in an unjustified manner create a less favourable legal, political, economic, or social position of individuals or (and) social groups”.

I have established that full equality can never be achieved, while for the equal protection of legal subjects it is necessary that their position is regulated in conformity with the criteria of justice. Pauer-Studer (2000) has carried out the following axiom of justice: “Persons need to be treated in view of standard X equally, if there are no reasons to treat them unequally, for the reasons which cannot be reasonably rejected”. In the mentioned sense, it is imposed on the legislature to regulate essentially equal states of facts equally, and essentially different ones unequally in proportion to their difference.²¹ Mahnič (2002) claims that equality before the law originally means that in the event of an equal factual and legal situation the same legal norm is to be applied, and that the legislature is bound in its normative activity to consider differences which actually exist, although that does not impede legislative regulation – which also includes the creation of different positions among legal subjects. According to Šadl (2002), the basic question of the principle of equality is what should not be equated, while a legal issue refers to the question of when

¹⁸ Ratkovič (2010).

¹⁹ Rawls (1971).

²⁰ Flander (2004).

²¹ Kranjc (2002).

it is just to treat unequal equally. The essence of the principle of equality is that persons in essentially similar positions are to be treated equally, and those in essentially unequal differently. Concerning such, Šturm²² adds that it is equally unjust to treat that which is unequal identically as treating that which is equal differently.

The principle of equality before the law does not mean that a regulation may not regulate the positions of legal subjects differently, but that it should not do that arbitrarily, without a rational and actual reason.²³ A finding whether two 'objects' compared in their essential characteristics are similar must be carried out on objectively substantiated value-based criteria. By distributive justice, the equal protection and non-discrimination of bearers of the HRs to equality is ensured, which can be restricted as dictated by general (public) interests, in the present sense by protecting FM competition as the object whose protection is to be ensured by a market's social state. The market's social state is, according to Rawls' procedural theory, obliged to abolish inequality among legal subjects by appropriate measures when a need for that is established.

A Theoretical Definition of the Concept of Positive Discrimination

Positive measures do not violate the principle of equality and equal protection of legal subjects, but are intended to exercise equal protection among them. An omission or refusal of necessary and appropriate adjustments which are dictated by special circumstances would thus interfere with the right to equal or non-discriminatory treatment.²⁴ By such measures, legal subjects as HRs bearers, who due to objective reasons are in a worse position in relation to a majority, are positively discriminated so that their position is improved and have a higher level of equal protection in social relations, and so that their more effective participation in an active social life is ensured.²⁵ Therefore, positive discrimination is a positive aspect of the principle of equality or equal protection.²⁶ Flander (2004) argues that what is understood by positive discrimination are situations in which a priority position of actually deprived social groups is established by institutional mechanisms, and the remedying of their existing (informal) inequality is made possible. By such treatment of deprived groups, a social element is entered into the criteria of unjust and just equality, which supplements generally predominant political and economic criteria.²⁷ Only when equal opportunities for different social groups are ensured, are an integral value-oriented development of society as a whole, and consequently a higher level of its moral and legal development made possible.²⁸ Flander²⁹ understands positive discrimination also as an interpretative approach that supplements the prevailing formal-logical and ensures actual equality. Between the actual reasons calling for the positive

²² Šturm et al. (2002).

²³ Constitutional Court of RS (2003).

²⁴ Šturm et al. (2011).

²⁵ Pišek (2010).

²⁶ Mahnič (2002).

²⁷ Flander (2004).

²⁸ Ibid.

²⁹ Ibid.

discrimination of certain social groups and the measures of positive discrimination, a reasonable proportion must be established, as well as, as is warned by Flander,³⁰ it is not allowed to interfere by such measures with acquired rights and the legal positions of members of a majority; the measures may not be used contrary to established general principles and the criteria of equality and other basic principles of an existing and valid legal order.³¹ The stabilization and integration-oriented system dimension of the effects of positive discrimination should not encroach on the protection of the basic principles of a democratic and rule-of-law state.³²

III. Free market competition, free economic initiative and equality, or the equal protection of business entities in the market

Free Market Competition in a Social Market State

Competition can be defined from various angles. Neumann and Weigand (2004) define it as “constitutive property of a market economy following immediately from the right of each individual to pursue his or her own interest”. For Kirchner (2004) market competition signifies rivalry among market participants, which enables the opposite party freedom of choice, the buyer a choice among various offerors, and the offeror a choice among different buyers. Zabel (1999) claims that the essence of market competition is that “every market participant ensures his or her priority over other participants by the use of admissible means”.

The free economic initiative of business entities as an economic freedom stems from the HR to freedom, which in convergence with social and other HRs creates the basis of free competition. As well, a social market state as the HRs guardian is obliged to ensure it as a long-term public interest. In the system of a social market state, free competition is not just created by unplanned rivalry among market participants, but their economic interests are realized in the conditions of co-existence and the exercise of other HRs.³³ For FM competition, beside the rule of supply and demand, it is also necessary to establish certain rules of the game. The state interferes with market self-operation by competition rules, since without that its economically and socially effective operation could not be achieved. The *ratio legis* of competition law, which can be implemented by competition policy as part of a wider state (or broadly regional, like the EU’s) economic policy, is the simultaneous ensuring of effective free competition and the greatest social welfare as possible. In that it is necessary to emphasize that in a social market state, social welfare is not only defined by merely economic, but also other social values.

As economic values may conflict with other social values and *vice versa*, the state must continuously ensure their co-existence by appropriate mechanisms. Its task is to prevent the restriction of free competition and market participants’ non-loyal activities by proper

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Korže (2005).

mechanisms, which is a necessary condition to pursue the goals in the system of economic competition policy. Concerning the role of the state in the area of free competition protection, various schools have been established in theory, which studied competition policies from different aspects.³⁴ The Harvard School of Competition has pointed to the need to ensure the equality of business entities in the market, which *inter alia* emphasized that the state's competition policy must focus on protecting SMEs from larger entities, and ensure their existence by state interventions.³⁵ From an ideological point of view, this school is very much associated with the concept of protection that is typical for states with a social-market system. For an effective FM game, a social market state must establish and properly balance macroeconomic and fiscal policies, create mechanisms to balance the relations between the scope of production of public and private goods and the goal of optimal allocation of producers, define the manners and conditions of a legally equal entry and departure from the market by market participants, and maintain a fair competition struggle among market participants by mechanisms for the prevention of restrictive and unfair practices.³⁶

Korže³⁷ defines competition law as a collection of legal rules whose purpose is to protect the economic and social functions of competition, and thereby enable the goals of free competition to be realized. The legal regulation of competition is defined in a similar manner by Schaper (2010). In an economic sense,³⁸ competition policy is defined to embrace policies and legal norms on the basis of which ensure that market competition is not restricted such that it would be detrimental for the society, in the sense as defined by the competition policy. Legal regulation creates an environment for effective competition.³⁹ The object of competition law is FM competition determined by competition goals (policies), while the subjects of protection being business entities to carry out economic activities in the market under equal or non-discriminatory conditions. The task of the legislature of individual social states is, in the mentioned meaning, to ensure the equality of business entities, or their non-discrimination, in view of the principle of justice.⁴⁰ The favourable treatment of SMEs is not contrary to the objective of economic welfare if it is limited to protect them from being abused by larger enterprises, or give them an advantage to balance against the financial and economic power of larger rivals. It is in conformity with the object of economic welfare, as it encourages effective allocation of resources and contributes to preserving prices in the economy.⁴¹

³⁴ Jones and Sufirin (2016).

³⁵ Ibid.

³⁶ Korže (2007).

³⁷ Ibid.

³⁸ Motta (2004).

³⁹ Schaper (2010).

⁴⁰ Ibid.

⁴¹ Motta (2004).

The Apparent Collision between Economic and Other Social (Functions) Goals of Competition

Neumann and Weigand (2004) assert that competition policy is an important part of economic and social policy, and thus it is a subject of opposing economic and social interests. They claim that from the view of economic interests the leading principle is the maximization of economic efficiency, whereas from the view of social interests completely different principles are at issue, such as, e.g., distributive justice.⁴² I am of the opinion that in states with well-working social-market regulation, the mentioned conflict is only apparent. The duty of a social market state is to create conditions for simultaneous realization of economic and other social goals of competition. Among the social goals of free competition, it is necessary to point out in particular the following: “the ensuring of the protection of FM competition and the protection of market participants in the already mentioned sense, the prevention of abuses by the excessive economic power of market participants, the carrying out of supervision over their economic power and the prevention of practices which would have negative effects on the market circumstances, the policy and legislation based on the exercise of HRs to ensure an appropriate level of education, health care, culture, social welfare, etc.”⁴³ Only through a permanent care for the co-existence of the HR to economic freedoms with other HRs, and through competition (economic) policy and policies in other areas of people’s activities and life can the social market state ensure optimal social welfare, and a long-term survival for business entities.⁴⁴

A conflict between economic and other social functions of competition appears when the state does not play its role in the mentioned sense. The predominance of the economic functions of competition over the other functions sooner or later results in negative effects on the existence and development of business entities (poor infrastructure, less qualified staff, poor entrepreneurial inventiveness, poor health of the workforce, etc.), whereas the predominance of social functions (‘hyper-production’) over the economic ones overburden the economic functions resulting in non-competitiveness of business entities in the market.⁴⁵ Economic globalization has been ruined, leading to a conflict between the HR to economic freedoms and other individual HRs,⁴⁶ which is to a great extent the cause for cyclic crises typical of liberal capitalism.

Business Entities as the Bearers of Human Rights and Fundamental Freedoms

I have established that business entities, equally as it *mutatis mutandis* applies to human beings, are also bearers of HRs, thus also the right to equality and the right to equal protection apply to them. In order to exercise this right and prevent the discrimination of business entities, the legislature is obliged, when dictated by objective circumstances,

⁴² Neumann and Weigand (2004).

⁴³ Korže (2007).

⁴⁴ Ibid.

⁴⁵ Ibid. See more about the meaning of human rights respect for long-term stability and competitiveness of business entities in Čertanec (2015).

⁴⁶ See more in Garcia (1999).

to remedy by positive discrimination measures less favourable positions of legal subjects who would find themselves in a position being prevented or at least made more difficult to access rights, goods, services, or benefits.

A Free Market Game among Business Entities and the Principle of Equality

In the market game, business entities must continuously strive for an advantage with respect to their competitors, which is necessary for their existence and development. The right to free economic initiative, grounded on the HR to freedom and the right to creativity, which individuals exercise directly or in the legal organizational form of companies on the basis of the HR to free association, enables competitors' activities in the market game to be inventive and unique. Still, they must be in conformity with the HR to equality limited by the equal rights of other competitors participating in the market, and the protection of fundamental social values or public benefits. The HR to equality thus limits the competitive activities of market participants, however, on the basis of such they must also be ensured under equal conditions to enter the market, carry out their business activities, and also leave the market game. The state must ensure to competitors the respect, exercise, and protection of the right to equality or prevent discrimination among them and, when it is necessary to exercise the right to the equality of subjects in special circumstances, take measures by which it discriminates positively concerning them. Due to diverse factual situations determined by life, in which the bearers of the right to equality are found, the legislature is imposed to regulate essentially different factual situations in an abstract legal norm differently than it is regulated for those whose characteristics are essentially similar. Therefore, it is the duty of the legislature to ensure market conditions for competitors such that they are able to exercise their right to free economic initiative under equal conditions, or that they are not discriminated against concerning such conditions.

IV. Legal bases to regulate the right to equality or legal equality and prevent discrimination

The Legal Bases of International Law

The right to equality or equal protection and the prohibition against discrimination are already regulated by the UDHR, which in Art. 1 determines the right to freedom, dignity, and equality as an inherent HR. In Art. 2 it provides that 'everyone is entitled to all the rights and freedoms set forth in this UDHR, without distinction of any kind'. In Art. 7 the UDHR determines that 'all are equal before the law and are entitled without any discrimination to equal protection of the law'.

The ICCPR and the ICESCR provide in Art. 2 that the state party to the respective Covenant will respect and ensure the rights proclaimed in the Covenants without any discrimination, while Art. 26 of the ICCPR supplements that provision determining that everyone is equal before the law and entitled to equal legal protection without any kind of discrimination. For that reason, '[t]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground'.

The ECHR does not define the right to equality, however, in Art. 14 it prohibits discrimination and provides that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground'. In the preamble to Protocol No 12 to the ECHR, a provision is substantively supplemented to oblige state parties to ensure equality before the law to all people.

The Legal Bases in the RS Legal Order

In the scope of the transferred sovereign rights that enable the operation of a EU single market, the member states have transferred to EU authorities also rights in the area of regulating competition protection in a single EU market (Art. 3 and Arts. 101–109 of the Treaty on the Functioning of the EU⁴⁷), while they maintain their power to regulate the legal protection of free competition in their (relevant) national markets. In the RS, the constitutional foundation to safeguard the protection of free competition in the national market is Art. 74 of the RS 1991 Constitution, which in para. 1 determines that economic initiative is free, while in para. 3 it prohibits unfair competition practices and practices which restrict competition, whereby it authorizes the legislature to define such practices. The basis of the right to equality is determined in Art. 14 of the RS Constitution, which under the title 'Equality before the Law' provides the following: "In Slovenia everyone shall be guaranteed equal HRs and equality before the law". Based on the ratified international conventions and the mentioned constitutional norms, the RS adopted the 2016 Protection against Discrimination Act (hereinafter: 'ZVarD'), which in Art. 1 prohibits any discrimination and determines the legal basis for establishing a guardian of equality as an independent state authority. Art. 1.3 specifically determines that protection against discrimination is also provided to legal entities that are defined by the RS legal order, if the circumstances that could be a basis for discrimination refer in their substance to such entities.

ZVarD regulates the possibility of taking special measures to ensure equality which is of a temporary character, and whose goal is to ensure the exercise of the right to equal treatment, equal opportunities, or actual equality and participation in the areas of the social life of persons who are in a less favourable position due to a certain personal circumstance, and are taken with the purpose of preventing or remedying the consequences of such a position, or represent compensation for a less favourable position (Art. 17.1). In Art. 17.2 the legislature lists examples of measures by which persons in a less favourable position in a certain area or environment are ensured special benefits or stimulations (the so-called 'stimulating measures'), and measures by which, if required measures and conditions are fulfilled, priority is given to persons with a certain personal circumstance, and may be used in cases where in such persons an evident disproportion exists concerning the possibilities of access to rights, goods, services, or benefits (the so-called 'positive measures'). If it is established that the goal of their implementation is achieved, they must cease to apply immediately (Art. 18.2).

⁴⁷ OJ EU, No 2012/C 326/01.

Legal Policy Reasons for the Positive Discrimination of SMEs

The striving of business entities to become economically stronger is based on free economic initiative as a human economic freedom, and is not in itself contrary to the essence of free competition if they pursue such a goal according to the traditionally defined economic functions of competition. Contrary to this freedom are practices of business entities in their wish to secure economic power that make use of processes leading to an unfair market game. The legislature has defined such practices and envisaged measures for their prevention. The focus of study thus deals with different actual positions between large enterprises and SMEs, which result from a privileged economic and market position of the large companies, and lead to an inequality among them. By the integration and concentration of capital, the market position of business entities is strengthened, the scope of overall purchase and thereby the economy of scope are increased, which results in lower costs of doing business. The described strivings and their effect, which are mainly legitimate and a legal right of business entities, can lead to unequal positions between economically powerful, merged, or connected market participants and small ones which do not have such power. The competitive advantages of large enterprises in view of SMEs on the market do not stem from objective competitive advantages, but from the effects of their economic power that already at the beginning enable them direct and indirect advantages. Schaper (2010) claims that inequality between large entities and SMEs is reflected in the following worse position of SMEs:

- * their business activities are geographically restricted;
- * the scope of their products and services are limited;
- * their market share is limited;
- * concerning knowledge and skills, they are limited due to informational asymmetry;
- * their access to well-established business entities in the market is worse;
- * they depend on a small number of key consumers;
- * they have higher costs to ensure the conformity of their operation with the regulations;
- * they are restricted concerning financial resources; and
- * they have limited access to specialized legal and economic advices.

Despite the fact that SMEs are numerically predominant, they are the most vulnerable group and very sensitive to competition.⁴⁸ They compete in the market with domestic entities and most frequently under the conditions of economic globalization with foreign business entities, which often have more favourable conditions of production due to more favourable political and economic conditions in the state of their origin.⁴⁹ Regardless of the fact that the mentioned reasons have a different effect on individual SMEs, they call for their special consideration.⁵⁰ In connection with such a question it is necessary to establish regulated competition such that these differences are taken into account and simultaneously the integrity of free competition is preserved. Storey (2010) argues that state authorities

⁴⁸ Gunasekarana, Rai and Griffin (2011).

⁴⁹ Ibid.

⁵⁰ Schaper (2010).

consider uniform regulation as the fairest and most administratively convenient. In the RS, the problems of SMEs in the market have been emphasized by the Chamber of Craft and Small Business of Slovenia (hereafter ‘CCSB’), which emphasized that SMEs should be treated differently than large ones. In its opinion, the differences refer to work organization, management, entrepreneurial philosophy, financing, staff development, added value per employee, etc.⁵¹ SMEs have a problem in obtaining financial resources, have limited access to new technologies, are impeded by a lack of flexible enough policies in the area of workforce and employment market, inappropriate tax legislation, and excessive costs of bureaucracy, which burden them more than large ones.⁵² The Chamber argues that SMEs have to be supported by the state.⁵³

Mahnič (2002) claims that the ensuring of equality for SMEs is a social goal that the RS as a social state must ensure by special normative intervention measures, since that is allegedly necessary for an efficient economy. Storey (2010) believes that positive discrimination is admissible if it is actually well-founded and necessary. Such regulation does not prevent, limit, or distort competition, but makes it possible. A care for the respect, protection, and remedying of any violation of the HR to equality (equal protection) imposes on the legislature the duty to create by appropriate measures conditions by which SMEs are ensured a basic market position such that is enjoyed by economically more powerful entities or, in the areas where this is not possible, to positively discriminate by appropriate normative measures concerning SMEs such that their existence is ensured. Equal and fair treatment of all business entities, given a simultaneous consideration of the specific character of SMEs, is a condition to stimulate competition.⁵⁴ SMEs are the basic part of every economy and present an important element to ensure competition in any state.⁵⁵

The Slovenian legislature defined the right to equality in more abstract details in ZVarD, whereby SMEs are not enabled effective exercise of the right to equality and prevention from discrimination. The operationalization of the mentioned legal foundations should be carried out by the legislature by a *lex specialis*, such that a FM game is ensured without SMEs being privileged in such, but with the reasons causing their lesser position removed. In the mentioned sense, in Decision No. U-I-355/98 (Item 11), the Constitutional Court of RS held that normative differentiation is admissible when there is a difference of factual situations, the differentiation is not arbitrary, and to achieve the purpose of such the legislature selects means that are proportional to the established difference of positions that are the basis for the normative differentiation. The selected criterion of differentiation must be in a rational relation with the object of (different) legal regulation, while the differentiation must also be justified by the application of the selected criterion. The Constitutional Court of RS also provided similar arguments in Decision No. U-I-18/02. According to the mentioned criterion expressed in the decisions, the legislature is empowered to prescribe conditions for an evaluation whether entities are in different

⁵¹ Pšeničny, Sedovnik, Krajnik et al. (2008).

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Schaper (2010).

⁵⁵ Ibid.

positions such that their positions need to be regulated differently (Item 17). Moreover, it is necessary to emphasize that differentiation of legal positions that would be based on illegitimate, hostile justice, or legal regulation that would be contradictory in itself, actually and systemically are in conflict with the human HR to equality.⁵⁶

V. The Regulation to Protect SMEs in the EU

The EU establishes that SMEs in an EU single market, in comparison with large businesses, are confronted with special problems, such as an inoperative market (difficult access to financial resources and investments into research and innovation, lack of resources to meet environmental regulations), and structural impediments (lack of a managerial and professional knowledge, rigid workforce market regulations, deficient information about growth opportunities at the international level, etc.).⁵⁷ The EU already defined an SME as a special category in 1996.⁵⁸ This was followed by Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small, and medium-sized enterprises.⁵⁹ One of the main goals of the SMEs Recommendation was to ensure that supportive measures are taken in favour of those businesses in all policies, programmes, and measures that the European Commission develops and administers for SMEs, and in the allocation of state aid.⁶⁰ An SME is not only determined based on the criterion of size (the number of employees, annual turnover, and balance total), but also according to the criterion of whether it has access to important additional resources, e.g., because of being in the capital ownership of large-sized business entities, in connection or partnership with them.⁶¹ SMEs are uniformly defined at the EU level that helps improve the coherence and efficiency of SMEs policies in the EU, which is absolutely necessary to integrate national measures with EU measures adopted to aid SMEs in the areas such as regional development and research resources.⁶²

In addition to the SMEs Commission Recommendations, the European Charter for Small Enterprises was adopted. The Charter determines the EU obligation to consider the “view of a small entrepreneur”⁶³ in creating policies and taking appropriate measures. The Charter includes a finding that SMEs are the “backbone of the European economy” since they are the main bearers of employment and innovation, while being at the same time very vulnerable to changes in the business environment, such that they need to be recognized as a special importance.⁶⁴ According to the Charter programme goals, the position of SMEs can be improved by activities to encourage entrepreneurship, by evaluating existing

⁵⁶ Šturm et al. (2002).

⁵⁷ European Commission (2015).

⁵⁸ Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises, OJ EU No L 107/4.

⁵⁹ OJ EU L 124/36.

⁶⁰ European Commission (2015).

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ European Commission (2014).

⁶⁴ *Ibid.*

measures, by adjusting the measures to SMEs, and by considering the specific needs of SMEs in the processes of creating policies.⁶⁵ The Charter envisages the possibility of introducing exceptions concerning the regulation of obligations for SMEs, and determines that the Commission could simplify competition legislation to reach that objective.⁶⁶

In June 2008, the EU Commission also adopted the Small Business Act for Europe⁶⁷ in which an entire framework of policies to encourage the competitiveness and development of SMEs was established. It incorporated the slogan ‘Think Small First’.⁶⁸

From the 2011 Commission Report,⁶⁹ it follows that in areas in which the incentives from the Small Business Act were foreseen, the business environment for small entities was improved, relating to the areas of competitiveness, innovation, and access to the market, and especially concerning public procurement.

In 2011, the EU Commission also published a proposal for a new framework programme for SMEs’ competitiveness – COSME 2014–2020, which is part of the research, innovation, and competitiveness bundle. In 2013, the EU Commission prepared a proposal of the Framework Programme for Research, Innovation, and Technological Development – HORIZON 2020. By EU Regulation, No. 651/2014, in connection with the provisions of Articles 107 and 108 of TFEU, the EU Commission proclaimed certain types of aid to SMEs as compatible with the internal market. The exemptions mainly refer to investments, aid for current operations and aid for access to financial resources, and are thusly exempted from their reporting to the EU Commission. In 2018, the EU Commission emphasized the importance of digitalization in company law, due to which the online establishment of SMEs’ international operations was made easier.⁷⁰

VI. Special regulation referring to SMEs in the RS legal order

States are empowered to regulate the area of business entities status in the framework of their sovereign powers. The Slovenian legislature defined business entities in Art. 13 of the 2007 Obligations Code (hereinafter ‘OZ’) as entities which carry out profitable activity. In Art. 55 of the 2009 Companies Act (RS) (hereinafter ‘ZGD-1’), the legislature determined that, based on the criteria such as an average number of workers in a business year, net income from sales, and the value of assets, they are classified into micro, small, medium, and large enterprises.

The purpose (*ratio legis*) of companies’ classification in ZGD-1 is to use potential preferential criteria for SMEs concerning certain economic activities, as well as for easier accounting. The EU legislation (e.g., Directive 2003/38/EC⁷¹) required that member states relieve SMEs of certain obligations with respect to accounting reports and disclosure,

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ COM (2008) 394 final.

⁶⁸ European Commission (2014).

⁶⁹ European Commission (2011).

⁷⁰ Bratina (2018).

⁷¹ Council Directive 2003/38/EC of 13 May 2003 amending Directive 78/660/EEC on the annual accounts of certain types of companies as regards amounts expressed in euro, OJ EU L 120/22.

which are otherwise imposed on limited liability companies. In such a manner, SMEs enjoy all exemptions and simplifications concerning accounting reports and disclosure in relation to yearly reports and individual accounting certifications.⁷²

Based on the categorization of companies according to the mentioned criteria, the legislature regulates differently the rights of individual entrepreneur (Art. 53.2 of ZGD-1), examination whether the state of individual active and passive items in books of account matches the actual state of affairs (Art. 54.4 of ZGD-1), the obligation to make a consolidated annual report (Art. 56.5 of ZGD-1) and audit the annual report (Art. 57.1 of ZGD-1), the responsibility of auditors (Art. 57.3 of ZGD-1), the requirement to explain statements (Art. 69.4 of ZGD-1) and report to the Government on payments by companies which carry out the activities of research, searching, developing, and exploiting the resources of minerals, oil, land gas, or other materials (Art. 70.b.1 of ZGD-1), and the amount of fines due to minor offences committed (Art. 685 of ZGD-1). In 2014, the Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (RS) (hereinafter 'ZFPPIPP') differently regulated the admissibility of: carrying out preventive reconstruction proceedings (Art. 44.b of ZFPPIPP); the carrying out of simplified compulsory composition proceedings (Art. 221.a of ZFPPIPP); the limitation, exclusion and enforcement of liability for damages (Art. 44 of ZFPPIPP); the approval of a financial reconstruction agreement (Art. 44.r of ZFPPIPP); and the right to challenge legal acts in bankruptcy proceedings (Art. 271 of ZFPPIPP).

In Section 4 of the 2008 Prevention of the Restriction of Competition Act (RS) (hereinafter 'ZPOMK-1'), the legislature regulated special rules concerning liability for damages due to a competition law violation. In Art. 62.h of ZPOMK-1, the legislature provided the joint and several liability of SMEs as an exception to limit their liability. In para. 2 it determined that SMEs are liable for damages only to their direct and indirect buyers, if they prove that their market share on the relevant market during the violation of competition law was at all times below 5 percent, and that the use of general rules on joint and several liability would irreparably jeopardize their economic ability of survival, while their resources would lose the entire value. As SMEs, it lists those violators who have less than 250 employees, whose annual turnover does not exceed EUR 50 million, or whose annual joint balance of accounts does not exceed EUR 43 million.

Furthermore, there is also different regulation for SMEs compared to large ones in accordance with other laws. Pursuant to the 2010 Economic Zones Act (RS), SMEs are entitled to certain more favourable conditions concerning initial investments (see Art. 20.a), the 2006 Corporate Income Tax Act (RS) (hereinafter 'ZDDPO-2'), and the 2011 Personal Income Tax Act (RS) (hereinafter 'ZDoh-2') enable tax exemptions for investments in research and development (Art. 55 of ZDDPO-2, Art. 61 of ZDoh-2), and for investing (Art. 55.a of ZDDPO-2) of which primary purpose is to aid SMEs.

For the special treatment of SMEs, the Slovenian legislature enacted the 2007 Supportive Environment for Entrepreneurship Act (RS), which in Art. 1 determines measures to encourage entrepreneurship and organization in that area and procedures to allocate

⁷² Government of the RS (2004).

resources intended to create a supportive environment for entrepreneurship. Moreover, the Government has adopted an Action Plan for the Implementation of the SMEs Act,⁷³ and an Action Plan for the Implementation of the 2012–2013 SME Act.⁷⁴ In the Action Plan, RS presented a selection of activities in the framework of the SMEs Act to implement or strengthen the entrepreneurial environment, and the operation of SMEs in 2010 and 2011. It continued activities with the Action Plan for the Implementation of the 2012–2013 SMEs Act. Among the more important activities to improve the position of SMEs enterprises, it emphasized the following:⁷⁵ the development and implementation of financial instruments, legislative amendments in the area of payment indiscipline, the continuation of carrying out a programme to abolish administrative obstacles and reduce administrative burdens with a special emphasis on considering the ‘think small first’ principle, and the introduction of the ‘SMEs Ambassador’ institution at the level of a state secretary within the Ministry of Economy, who in 2011 assumed the active role of an unofficial SMEs representative. The 2015–2020 Programme to Implement Financial Incentives by the Ministry of Economic Development and Technology⁷⁶ also intended a special attention to SMEs. The SMEs located in the entire territory of the RS are, in accordance with Arts 17 to 20 of Regulation 651/2014/EU,⁷⁷ entitled to state aid concerning investment in SMEs, consultation to the benefit of SMEs, SMEs’ participation at fairs, and for the costs of participation of SMEs in the framework of projects of the European Territorial Cooperation.⁷⁸ Digitalisation has enabled massive global financing, which is not only limited to banks and classical financial markets, and thereby made financing for SMEs easier.⁷⁹

It may be concluded from the actual position of SMEs described in the previous section that, in the organizational and functional sense, their position essentially differs from the position of large enterprises, making the first being less competitive in the market than the latter. The differences relate to their more difficult entry into the market as well as concerning the conditions of their operation and existence in the market. Thereby it needs to be emphasized that the duty of the state to establish a special protection of SMEs is not only based on their right to equal protection or the prohibition against discrimination, but also on broader social interests demonstrated in relation to the significance of SMEs for state economy and consumer supply, such as, e.g., the ensuring of local provision of everyday life needs to inhabitants close to their dwellings, the carrying out of individual activities, in particular craftsmanship. Therefore, special protection of SMEs can be justified by the state’s duty to ensure the respect and protection of the HR to equality or equal protection, and by the tasks of every democratic and particularly social market state to prevent by intervention measures market anomalies that have an impact on the entire and regular

⁷³ Government of the RS (2010).

⁷⁴ Government of the RS (2012).

⁷⁵ *Ibid.*

⁷⁶ Ministry of Economic Development and Technology (2015).

⁷⁷ Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ EU L 187/1.

⁷⁸ Ministry of Economic Development and Technology (2015).

⁷⁹ Bratina (2018).

supply of goods in the market. The legally defined task of the state is based on the theoretical starting points from Section 2, which deals with the substantive framework of the HR to equality (equal protection) and, in relation with the principles of justice, the prohibition against discrimination or the conditions that dictate that the state discriminates against certain legal subjects positively. In the legal regulation of rights and obligation of legal subjects the basic criterion is the discussed rule according to which ‘objects or subjects’ which are similar in their essential characteristics are treated equally, while ‘objects or subjects’ that are essentially different, according to the objective criteria of Rawls’ procedural theory of justice, are treated differently.

VII. The empirical research

The Actual State of Affairs in the Republic of Slovenia

According to the Agency of the Republic of Slovenia for Public Legal Records and Related Services,⁸⁰ the majority of business entities in the RS are micro ones (94.0 percent). Their significance for the economy is thus great since micro-sized enterprises have 29.9 percent of all employees, and with 22.1 percent of all resources they created 19.4 percent of all net income from sales.⁸¹ In 2016, small-sized enterprises had 15.9 percent of all employees, obtained 13.1 percent of net income from sales, and had 11.9 percent of all assets; while medium-sized enterprises had 19.2 percent of all employees, obtained 17.4 percent of all net income, and had 13.4 percent of all the enterprises’ assets.⁸² All together, the SMEs had 65 percent of all employees, obtained 50.9 percent of all net income from sales, and had 47.4 percent of all the companies’ assets.

I have tested the theoretical findings on the actual state of respecting the HR to equality and the prohibition against discrimination concerning SMEs based in the RS through empirical research. The goal of the empirical research was to examine through a survey a thesis according to which SMEs are in a deprived position in comparison to large enterprises in the FM. The survey includes questions relating to the recognition and experience of respondents in relation to their presence in the market (e.g., delivery periods, price), and the differences between SMEs and large enterprises. The survey results are the basis to create proposals for necessary systemic changes and amendments in the RS legal order.

The Sample and Data Collection

The entities involved in the survey were SMEs irrespective of the branch of activity, capital ownership, and other circumstances. The surveyed entities were members of the Chamber of Commerce of Slovenia (hereafter ‘CC’), the CCSB and the University Incubator Ljubljana. Two hundred and fifty entities responded to the survey that was sent to CC members,⁸³ from which 152 ceased to participate at the very beginning of the survey, and

⁸⁰ AJPES (2017).

⁸¹ Ibid.

⁸² Ibid.

⁸³ The survey was available in the period from 23 March 2017 until 23 June 2017 and from 12 July 2017 until

thus only 98 respondents remained. Only 16 CCSB and University Incubator Ljubljana⁸⁴ members filled out the survey entirely.

The low response rate may have resulted from the complexity of the questionnaire, as well as the fact that the surveyed entities did not recognize the importance of the analysed topic to a sufficient extent.

The Survey Results

The data collected by the survey were analysed, whereby the results presented in the continuation are to a certain extent relativized by certain limitations stemming from the character of the survey, as well as from a low response rate by the entities surveyed. The survey was addressed to business entities' leadership, composed in a manner such that respondents could respond to the questions by circling one of the suggested replies as well as by briefly explaining their replies in a descriptive manner.

Out of 98 surveyed enterprises, CC members, 80 were completed. The sample of the surveyed enterprises includes 33 micro (41 percent),⁸⁵ 40 small (50 percent), and 7 medium-sized (9 percent) enterprises. Eighty-eight percent of the enterprises surveyed are in domestic private capital ownership, five percent are in the capital ownership of the state, and eight percent are in foreign ownership. The surveyed enterprises' average year of existence is 23 years. In 2016, 88 percent stated that they had operated with net profit, eight percent operated with a net loss, and five percent reached a null result. From 16 surveyed enterprises, CCSB and University Incubator Ljubljana members, 11 replied entirely. The sample of the surveyed enterprises includes nine micro (82 percent), and two small enterprises (18 percent). All the respondents are in domestic ownership, eight of them had profit, while three showed a null result.

The results show that 47 percent of the respondents replied affirmatively to the question whether they ensure equal conditions for business operation in comparison with large enterprises. Thirty-four percent of them asserted that they were in a worse position, as the legal order does not ensure their equal position with respect to buying reproduction material, payment insurance, advance payments and payment deadlines, transportation, storage, and administrative costs concerning documentation management. The remaining surveyed entities did not provide reasons for their negative replies.

Regarding the question of whether the respondents have equal access to established suppliers as large enterprises, 66 percent of them stated that they were not in a worse position, 20 percent believe that they were in a worse position, while 14 percent did not have an opinion. The respondents who believed they were in a worse position grounded their unequal position on unequal conditions in public procurement procedures, lower rebates

12 October 2017. The survey questionnaire was composed of 22 questions and formed on the basis of own theoretical and scientific findings, and was published online by means of IKA online survey tool.

⁸⁴ The survey was available in the period from 25 March 2019 until 25 June 2019. The survey questionnaire composed of 26 questions and was formed on the basis of own theoretical and scientific findings and was published online by means of IKA online survey tool.

⁸⁵ The percentages in decimals are rounded, to 5 down, and over 5 up.

due to smaller quantities, more difficult access to competent workers of the suppliers, and more difficult access to data/databases, etc.

Concerning the question of whether the addressed enterprises are ensured equal conditions of business in the market in comparison with large enterprises in relation to the sale of goods, 58 percent of the respondents replied that they were not in a worse position, 29 percent of them stated that they are indeed in a worse position, while the remaining ones did not have an opinion on that. The respondents that believed they were in a worse position base their beliefs on unfair competition practices, dumping prices, and greater negotiation strength of large companies, as well as buyers' low response to their offers due to a smaller scope, worse payment conditions for them, better competitive abilities of the large companies, direct access of the large to merchants' shelves, while the small-sized access them only through agents, etc.

To the question whether equal conditions are provided for the respondents in comparison with large enterprises in obtaining business through public procurement procedures, only 40 percent of the respondents believe that they were in an equal position in comparison with the large, while 30 percent of them stated that they were not in an equal position, whereas 30 percent of them did not have an opinion. The respondents who don't believe they have an equal position assert that such is demonstrated in the adaptability of public calls and biased calls, discriminatory dumping prices, the inability of newly established entities to compete with the references of large ones, too complex preparations to make bids for small-sized entities, too frequent annulments of decisions once the small have been selected, corruption, connections and acquaintances, etc.

With respect to the question whether SMEs are provided equal conditions of operation in comparison with large enterprises to obtain financial resources and assets, 51 percent of the respondents believed that they were in an equal position, while 26 percent did not agree with that, and 23 percent did not know. The respondents who believed they were in a worse position state that such a position is reflected from their more difficult access to financing, SMEs are treated as more risky, procedures are too complicated for small companies, while large ones more easily secure financing due to their bonuses and cheaper insurance, also through connections and acquaintances, large ones may employ specialists skilled in obtaining financial resources, and in large enterprises workers are prepared to work for a minimal wage, while in small ones that is not the case.

With regard to the question concerning the obtaining of workers in the market and the preservation of their employment, 77 percent of the respondents state that they are ensured equal conditions of operation in comparison with large enterprises, 13 percent believed that that is not the case. The remaining ones did not reply to this question. The respondents who believed they weren't in an equal position stated some reasons like working in specific industries (e.g. construction operations), as they found it more difficult to find suitable workforce.

Concerning the question whether, in view of the criterion of size of business entities and their economic power in the market, the state must protect the position of SMEs by appropriate special legal measures, 60 percent of the respondents believed that the state must ensure equal conditions of operation for all business entities in the market, 14 percent

stated that that was not necessary, while the remaining ones had no opinion concerning such. Among the tasks that the state must carry out to ensure the protection of SMEs, the respondents stated: the protection of legality and the prevention of corruption and nepotism; control over the issuing of invoices, coherent and clear regulations; equal and fair application of regulations for all; state authorities' timely activities; faster operation by administrative authorities and faster resolution of judicial disputes; consumer protection with controlling the truthfulness of product characteristics; severe sanctions for entities giving untrue information about their products; ensuring long-term stable conditions of business operation without greater and fast changes; ensuring a stable framework of operation stimulating investment and ensure regular payments for services performed; transparency; prevention from cartel agreements; supporting development-oriented SMEs who provide workplaces; the persecution of unfair competition; ensuring public calls based to select a bidder on the quality/price criterion; reduction of administrative and other obstacles for SMEs ensuring equal conditions for all entities – equal exemptions and business requirements; providing fast administrative procedures for all legal entities; prevention of moonlighting; the reduction of administrative barriers; and the introduction of flat taxation.

With respect to the question whether they stated that any of their HRs were violated in connection with the conditions of business operation in the market, and whether they are acquainted with the striving of the EU, international (e.g., by the Organisation for Economic Co-operation and Development) and national organizations (e.g., the CCSB), or competent RS authorities to enact special measures to protect SMEs, 11 per cent of them responded positively, while 61 percent negatively, with 28 percent had no opinion on that. From the replies of those who recognized HRs violations, it follows that the respondents were not aware of their HRs. In relation to replies, they only recognized a problem of inequality in the area of labour law and tax law (bad supervision). They stated that large enterprises have more benefits because they have more possibilities for subventions, e.g., in employment and development. Only one respondent stated that all the entities should have equal rights regardless of their size. The respondents did not know constitutional and international convention rights and the content of the UN Guiding Principles on Business and HRs adopted by UN HRs Council (2011).

Among the proposals to improve the position of SMEs the respondents stated the following:

- * Definition of criteria to ensure a minimal quality of materials;
- * Increase of penalties for grey economy;
- * Simplification of bureaucratic procedures;
- * Cancellation of all types of aid and subsidies and the lowering of taxes and contributions;
- * Awareness and creation of a code of conduct;
- * Punishment of those market participants who distort the market by inadmissible low prices;
- * Enabling by regulations that market participants will be competitive in domestic and foreign markets;
- * Lowering of VAT and its more consistent collection;

- * Care for the transparency of business operation;
- * Incentives for business entities to act legally;
- * Change of the government;
- * Greater flexibility in employment and the possibility of dismissal without reasons;
- * Termination of all existing economic concepts;
- * Selecting a bidder with the most favourable, not cheapest, bid;
- * Stricter control of business entities who do not pay subcontractors;
- * Fair judiciary, punishment of non-payers and removing them from the market, lower taxation of small companies' profit intended for investment; and
- * The conditions of business should be proportionate to the size of an economic entity.

VIII. Conclusion

From the respondents' replies, it follows that a majority of SMEs do not recognize that they are in a non-equal or discriminatory position in comparison with large enterprises in the economic system and the market. The surveyed enterprises that otherwise say that they operate in worse conditions than large ones, do not recognize that in the exercise of the human right to equality or equal protection the legislature should be obliged to improve their competitive position at a system level by positive discrimination measures. They perceive the need for changes primarily in connection with the need for more consistent implementation of the valid legal regulation, particularly in relation to the selection of a bidder in public procurement procedures based on the criterion of quality, not the lowest price. The individual respondents who recognize that SMEs are violated their right to equal protection by the conditions of business in the market propose various general system improvements and a better supervision over all the business entities in the implementation of the valid regulations.

The sample is small due to a low response rate. I assume that reflects the ignorance and non-awareness of the survey addressees that also business entities are objects of HRs protection, and that the state is bound to ensure conditions for their exercise. Due to a small sample, the survey results probably do not entirely reflect an objective state of affairs, however, they point to essential characteristics of the business environment and the areas in which the state should ensure by legal and other means that, given the conditions of free competition, small companies should not be 'victims' of the economically strong. The valid legal acts by which the legislature has regulated the protection of the HR to equal protection and the conditions for positive discrimination do not ensure to SMEs appropriate protection, since the provisions of such acts are too abstract, thus the legislature should in every area in which the existence and development of SMEs is jeopardized in a competition battle with the large ones, regulate such with *lex specialis* provisions. Only in such a manner could be the unequal business position of SMEs and large enterprises remedied.

In addition to the possibility to obtain financial and other incentives for SMEs to enter the market and the mitigation of individual administrative requirements that SMEs are entitled to in the valid legal order, the state should be bound to abolish by positive discrimination measures more severe conditions for business operation of SMEs in order to compete

with larger rebates of the large in specific branches (e.g., such that suppliers would be obliged in a specific business year to recognize the small a rebate on the joint extent of turnover in the same percentage as they recognized it to the large ones), and to ensure better implementation of regulations from the area of free competition restriction, in particular concerning the control of abusing a dominant position and abolishing negative consequences in an individual relevant market of goods and services with respect to an SME being pushed out of the market, etc.

In the area of public procurement, the forms of demonstrating bonuses should be supplemented by mechanisms such that SME would easier fulfil that requirement. The obtaining of financial resources in the financial market should be made easier for SME by substitutes to equalize worse conditions in comparison with those of large enterprises, which would ensure their equal starting position and would not be contrary to the prohibition of obtaining state aid (the equalization of a competitive position). In the area of retail trade, the legislature should create a standard of local supply and should enforce such by special incentives concerning the conditions of business of small retailing shops, in particular in rural areas. By such a solution, not only the requirements of equal protection of an SME would be met, but also the right of citizens to local supply and for which their consumer protection would be contributed.

References

- AJPES (2017). *Information on the Business Operation of Companies in the RS in 2016*. Ljubljana: AJPES.
- Andreangeli, A. (2008). *EU Competition Enforcement and Human Rights*. Cheltenham, UK: Edward Elgar Publishing Limited.
- Beyazit, E. (2010). Evaluating Social Justice in Transport: Lessons to be Learned from the Capability Approach. *Transport Reviews*, 31(1), 117–134.
- Bratina, B. (2018). Novosti pri poslovanju družbe z omejeno odgovornostjo. *Podjetje in delo*, 6–7, 1034–1044.
- Cerar, M. (2005). Nekateri (ustavno)pravni vidiki načela diskriminacije. In Zagorac, D. (ed.). *Enakost in diskriminacija: sodobni izzivi za pravosodje*. Ljubljana: Mirovni inštitut.
- Constitutional Court of RS (2003). Decision No. U-I-18/02 of 24 October 2003.
- Čertanec, A. (2015). *Varstvo človekovih pravic pri delovanju gospodarskih subjektov po Smernicah Združenih narodov*, doctoral dissertation. Ljubljana: Faculty of Law.
- European Commission. (2011). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Review of the “Small Business Act for Europe”*, COM/2011/78 final.
- European Commission. (2014). *Evropska listina o malih podjetjih*. Luksemburg: Urad za uradne objave Evropske skupnosti.
- European Commission. (2015). *Smernice za opredelitev MSP*. Luxembourg: Urad za publikacije Evropske unije.
- Flander, B. (2004). *Pozitivna diskriminacija*. Ljubljana, Fakulteta za družbene vede.

- Garcia, F. J. (1999). The Global Market and Human Rights: Trading Away the Human Rights Principle. *Brooklyn Journal of International Law*, 25, 51–98.
- Government of the RS (2004, December 9). Preposition of the Act Amending the Companies Act (ZGD-H), EVA: 2004-2111-0105.
- Government of the RS (2010, May 6). *Action Plan for the Implementation of the Small-Sized Enterprises Act*. Retrieved July 1, 2019, from http://www.mgrt.gov.si/fileadmin/gov.si/pageuploads/DPK/SBA/Akcijnski_nacrt_2010_2011.pdf.
- Government of the RS (2012, April 26). *Action Plan for the Implementation of the 2012 to 2013 Small-Sized Enterprises Act*. Retrieved July 1, 2019, from http://www.mgrt.gov.si/fileadmin/mgrt.gov.si/pageuploads/DPK/SBA/AN_2012-2013_k.DOC.DOC.
- Gunasekarana, A.; Rai, B. K.; Griffin, M. (2011). Resilience and Competitiveness of Small and Middle-Sized Enterprises: An Empirical Research. *International Journal of Production Research*, 49(18), 5489–5509.
- Human Rights Council (2011, March 21). *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, A/HRC/17/31.
- Jones, A.; Sufirin, B. E. (2016). *EU Competition Law* (6th edn.). Oxford, New York: Oxford University Press.
- Kirchner, C. (2004). Competition Policy vs. Regulation: Administration vs. Judiciary. In Neumann, M.; Weigand, J. (eds.). *The International Handbook of Competition*. Cheltenham (UK), Northampton (MA; USA): E. Elgar.
- Korže, B. (2005). Uloga tržišno-socialne države u uspostavljanju slobodne konkurencije u uvjetima ekonomske globalizacije. *Pravo u gospodarstvu*, 44(3), 123–138.
- Korže, B. (2007). Naloge tržišno-socialne države pri vzpostavitvi varstva majhnih udeležencev na trgu. In Dnevi slovenskih pravnikov. *Dnevi slovenskih pravnikov 2007 od 11. do 13. oktobra*, Portorož. Ljubljana: GV Založba.
- Korže, B. (2010). System Argumentation for Direct Binding of EU Bodies by the European Convention on Human Rights and Freedoms to the Extent of their Competences. In Kandžija, V.; Kumar, A. (eds.). *Economic Integration, Competition and Cooperation*. Rijeka: Faculty of Economics.
- Korže, B. (2014). Obligations of the Social Market State and Business Entities according to the EU Guiding Principles. *International Journal of Business and Public Administration*, 11(2), 1–22.
- Krajnc, L. (2016). Spolna diskriminacija in zastopanost žensk v varnostnih organizacijah, master’s paper. Kranjc, J. (2002) Načelo enakosti: meje in možnosti. *Javna uprava*, 38(3), 313–337. Ljubljana: Faculty of Criminal Justice and Security.
- Lampe, R. (2010). *Pravo človekovih pravic: Sistem človekovih pravic v mednarodnem, evropskem in ustavnem pravu*. Ljubljana: Uradni list Republike Slovenije.
- Landy, F. J.; Conte, J. M. (2010). *Work in the 21st Century* (3rd ed). (Malden (MA); Oxford: Blackwell.
- Mahnič, P. (2002). Enakost in enakopravnost. *Javna uprava*, 38(3), 357–372.
- Martens, K. (2017). *Transport Justice: Designing Fair Transportation Systems*. New York and London: Routledge.

- McBeth, A. (2010). *International Economic Actors and Human Rights*. London, New York: Routledge.
- Ministry of Economic Development and Technology (2015, April 22). *The 2015 to 2020 Programme of Implementing Financial Incentives by the Ministry of Economic Development and Technology*, No. 3030-14/2015/8. Retrieved July 1, 2019, from http://www.mg-rt.gov.si/fileadmin/mg-rt.gov.si/pageuploads/Programi/Program_MGRT_22.4.2015_FINAL.pdf.
- Motta, M. (2004). *Competition Policy, Theory and Practice*. Cambridge: Cambridge University Press.
- Neumann, M.; Weigand, J. (eds.) (2004). *The International Handbook of Competition*. Cheltenham (UK), Northampton (MA; USA): E. Elgar.
- Pauer-Studer, H. (2000). *Autonom leben: Reflexionen über Freiheit und Gleichheit*. Frankfurt am Main: Suhrkamp Verlag.
- Pavčnik, M. (1997). Razumevanje temeljnih (človekovih) pravic. In Pavčnik, M.; Polajnar-Pavčnik, A.; Wedam-Lukić, D. (eds.). *Temeljne pravice*. Ljubljana: Cankarjeva založba.
- Pišek, T. (2010). *Pozitivna diskriminacija*, graduate paper. Maribor: Faculty of Law.
- Pšeničny, V.; Sedovnik, P.; Krajnik, D. et al. (2008). *Zahteve slovenske obrti in podjetništva 2008: enakost malih in velikih je neenakost malih*. Ljubljana: Obrtno-podjetniška zbornica Slovenije.
- Ratkovič, N. (2010). *Kritike Rawlsove teorije pravičnosti*, graduate paper. Ljubljana: Faculty of Economics.
- Rawls, J. (1971). *A Theory of Justice*. Cambridge: Harvard University Press.
- Schaper, M. T. (2010). Competition Law, Enforcement and the Australian Small Business Sector. *Small Enterprise Research*, 17(1), 7–18.
- Schmid, T. (2008). Enakost in pravičnost: med seboj povezana pojma? *Socialno delo*, 47(1/2), 65–85.
- Storey, D. J. (2010). The Competitive Experience of UK SMEs: Fair and Unfair. *Small Enterprise Research*, 17(1), 19–29.
- Šadl, U. (2002). Izhodišča načela enakosti. *Javna uprava*, 38(2), 395–410.
- Šturm, L. et al. (2002). *Komentar Ustave Republike Slovenije*. Ljubljana: Fakulteta za podiplomske državne in evropske študije.
- Šturm, L. et al. (2011). *Komentar Ustave Republike Slovenije: dopolnitev – A*. Kranj: Fakulteta za državne in evropske študije.
- Tratar, B. (2008). *Učinkovanje ustavnih pravic med zasebnopravnimi subjekti*, doctoral dissertation. Ljubljana: Faculty of Law.
- Zabel, B. (1999). *Tržno pravo*. Ljubljana: Gospodarski vestnik.

